Supreme Court, U.S.
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No. 01-1522

IN THE SUPREME COURT
OF THE UNITED STATES

NICK FURFARO; BRANDY KIDDER;
ESMERALDA SILVA; and JJR, INC.,

Conditional Cross-Petitioners,

v.

CITY OF SEATTLE,

Conditional Cross-Respondent.

On Petition for a Writ of Certiorari to the Supreme Court for the State Of Washington

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BRIEF IN OPPOSITION TO CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

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OPPOSITION TO FURFARO'S CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

Conditional Cross-Respondent City of Seattle hereby opposes the conditional cross-petition for a writ of certiorari in this case by Furfaro.[1] Seattle's adult entertainment ordinance regulates conduct, such as simulated masturbation and self-massage, as well as obscene expression. Furfaro's cross-petition attempts to characterize Seattle's adult entertainment ordinance as "the same kind of statutes" addressed in this Court's prior decisions dealing with books and films: i.e., "an anti-obscenity statute." Cross-Pet. at i. In fact, Seattle's ordinance regulates both acts and simulated acts, but does not attempt to regulate books or films. SMC 6.270.100(A)(2); Cross-Pet. at 2. There is no dispute that the arrests in this case were based upon actions, rather than the content of printed materials or films.

Regarding Furfaro's first question presented, the City concedes that the question of whether a warrant should be required in order to make arrests under Seattle's ordinance presents a significant question of federal law. However, this Court has *already* determined that nude dancing is not afforded the same First Amendment protections as books and films, and the Washington Supreme Court's rejection of the warrant requirement is not in conflict with this Court's decisions.

Furfaro's second question presented was not preserved on appeal and is not properly presented to this Court. The City opposes consideration of whether

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[1] Hereinafter, collectively, Kidder, Silva, Furfaro and JJR, Inc.

officers should be required to subjectively determine obscenity as part of a probable cause determination *prior* to making arrests under Seattle's ordinance.

STATEMENT OF THE CASE

A. Factual Background.

1. Seattle police officers arrested the individual plaintiffs for conduct.

Undercover Seattle Police detectives entered Rick's nightclub on November 20, 1995, to look for conduct violations of Seattle's adult entertainment ordinance, SMC 6.27.100. One detective made a tape recording of observed conduct violations, and he verbally described the actions of entertainers on the main stage. Pet. App.[2] at 3 (144 Wn.2d at 366-67).

The taped observations included the detective's observations of "Gabrielle," the stage name used by Brandy Kidder. Pet. App. at 68-70. The tape also included observations of "Essie," whom Swanson later learned was Esmeralda Silva. Pet. App. at 70. The detective recorded the following observations for Kidder and Silva:

> Gabrielle on the main stage black sparkling string bikini. She touched her anus, buttocks, massaged her breasts. Gabrielle has long brown hair, slightly on the heavy side.

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[2] Appendix to the City's Petition for Writ of Certiorari in No. 01-1316, the companion to the instant cross-petition.

* * *

> Jessie on the main stage. A Hispanic female, long black hair wearing a black lace bra and a matching black lace t-bar and white stiletto heels. Jessie is massaging her breasts and massaging her vagina. Again massaging her breasts, pinching her nipples; she just massaged her vagina, again massaging her breasts, pinching her nipples. She again massaged her vagina.
>
> * * *
>
> I think we've come around full circle. Gabrielle is back up on stage. She just touched her vagina again, rubbing her breasts, and (unintelligible).

Pet. App. at 84-85, 87.

Based on the recorded observations, officers arrested 13 dancers, including Silva and Kidder, as well as their manager, plaintiff Nick Furfaro. Pet. App. at 3 (144 Wn.2d at 367). Silva, Kidder and Furfaro subsequently challenged their arrests under 42 U.S.C. § 1983, alleging a violation of the First, Fourth, and Fourteenth Amendments, as well as additional claims. Pet. App. at 3-4 (*Id.*).

2. The City obtained partial summary judgment prior to trial.

At summary judgment, the trial court dismissed all state tort claims, and dismissed on qualified immunity grounds all 42 U.S.C. § 1983 claims against individual defendants. However, the trial court

preserved § 1983 claims against the City for trial. Pet. App. at 3-4 (144 Wn.2d at 367).

3. The jury found that officers had probable cause to arrest for criminal conduct.

At trial, Brandy Kidder denied committing the criminal acts reported by the detective, and testified that she did not masturbate during her stage appearance. Pet. App. at 57-58. Kidder testified that her hands didn't remain in any one area (Pet. App. at 56), and that she "didn't do any dirty dances that day." Pet. App. at 59. Finally, she testified that she never thought any of her actions could be considered masturbation or simulated masturbation. Pet. App. at 61-62.

Esmeralda Silva likewise denied committing the acts observed by the detective, and testified that she never massaged her vagina or rubbed her vaginal area during her stage appearances on November 20. Pet. App. at 65. Instead, she testified that she merely covered herself with her hands. *Id.* Neither Kidder nor Silva admitted at trial to massaging breasts or rubbing vaginas in the manner described by Detective Swanson, nor did either testify that she intended to convey any message by massaging her breasts or rubbing her vagina on November 20.

At trial, officers testified that they had observed conduct violating the ordinance's prohibition on touching, caressing, or fondling of the breasts, buttocks, or genitals. Detective Swanson confirmed that he had observed the violations by Kidder and Silva as

recorded on the tape. Pet. App. at 82-83. None of the touches were momentary or fleeting touches. *Id.* According to the detective, "massaging a breast" means grabbing the breast and squeezing, manipulating it with the hand. Pet. App. at 75. "Massaging the vagina" means actual touching of the vaginal area with the hand and fingers for two to three seconds. Pet. App. at 78-79. Detective Swanson did not record incidental contact or incidental touching as a violation. Pet. App. at 80-81.

Kidder and Silva played a videotape to the jury purporting to show the type of dances performed by Kidder and Silva. However, the detective testified that the videotape omitted the specific conduct violations that he had observed during the performances by Kidder and Silva. Pet. App. at 20-21 (144 Wn.2d at 380).

During its deliberations, the jury was instructed by the trial court as follows: "In determining probable cause, an arresting officer making an arrest for expression, must consider obscenity. In determining probable cause, an arresting officer making an arrest for conduct, need not consider obscenity." Pet. App. at 22-23 (*Id.* at 382-383). There was absolutely no evidence at trial that any officer considered obscenity or made an arrest for expression. Pet. App. at 19 (*Id.* at 378). Instead, the officers testified that they observed and arrested for conduct violations of Seattle's ordinance. Pet. App. at 17 (*Id.* at 377-378). The jury found that the arresting officers had probable cause to arrest Furfaro, Kidder, and Silva. Pet. App. at 29 (97 Wn.App. at 540).

B. The Court of Appeals Imposed a Warrant Requirement and Remanded Plaintiffs' Wrongful Arrest Claims for Trial on Damages.

Furfaro appealed, contending that warrants were required as a matter of law prior to the arrests in this case. Furfaro did not assert any claim or assign error regarding the timing of the arresting officer's probable cause determination.

The Washington Court of Appeals found that the activities described by the arresting officers were "nude dance performances" (Pet. App. at 28 (*Id.* at 539)), and therefore "presumptively protected by the First Amendment." Pet. App. at 33 (*Id.* at 543). The Court of Appeals ruled that a warrant was required prior to making arrests under Seattle's ordinance, and remanded the case for additional proceedings. Pet. App. at 43 (*Id.* at 551). The opinion contains no mention of any contention by Furfaro that, in the absence of a warrant requirement, arresting officers should be compelled to *subjectively* engage in an evaluation of obscenity *prior* to the arrests in this case, nor was the remand for trial to include such a requirement.

C. The Washington Supreme Court Properly Rejected the Warrant Requirement.

The Washington Supreme Court reversed the Court of Appeals' requirement that officers obtain a warrant from a magistrate prior to effecting arrests under Seattle's adult entertainment ordinance. Pet. App. at 25 (144 Wn.2d at 384). As the court noted, "the

Supreme Court precedents cited by Respondents do not support the claim that the First Amendment affords nude dancing the same level of protection given to books and film." Pet. App. at 11 (144 Wn.2d at 374). The court continued as follows:

> On the contrary, the United States Supreme Court's reiterated opinion is that nude dancing only receives *minimal protection* under the First Amendment. That level of protection is insufficient to support the Court of Appeals' contention that a warrant is required by the First and Fourth Amendments *even though no federal or Washington court had recognized such a requirement.*

Pet. App. at 12 (*Id.*) (emphasis supplied).

The Washington Supreme Court did go on to hold that all acts by adult entertainers are expressive conduct, interpreting *City of Erie v. Pap's A.M.* as having "stated clearly, for perhaps the first time, that nude dancing is expressive conduct." Pet. App. at 17 (144 Wn.2d at 278). The Washington Supreme Court then found that probable cause for the arrest of such entertainers must include a determination of obscenity. Pet. App. at 21-22 (*Id.* at 381-382). As a result, the case was remanded for trial on the question of whether the arresting officers had probable cause to believe that the observed acts were obscene. Pet. App. at 23 (*Id.* at 383).

The opinion contains no mention of any contention by Furfaro that, in the absence of a warrant

requirement, arresting officers should be compelled to *subjectively* engage in an evaluation of obscenity prior to the arrests in this case. The opinion remands for a new trial on the federal claims, and notes that the trial will not include claims of an unreasonable arrest procedure. Pet. App. at 24 (144 Wn.2d at 384). Notably, there is no directive that the jury instructions on probable cause be modified to require officers to subjectively evaluate obscenity prior to making arrests.

Furfaro moved for reconsideration, seeking to preserve state claims for injunctive relief. Furfaro did not seek clarification regarding the timing of the arresting officer's probable cause determination. The Washington Supreme Court granted reconsideration in part by order dated December 5, 2001. Pet. App. at 46-48.

REASONS FOR DENYING THE CONDITIONAL CROSS-PETITION FOR A WRIT

Furfaro contends that its questions presented in its Cross-Petition are "inextricably intertwined" with the issues presented in the City's petition. Cross-Pet. at 10. However, Furfaro fails to demonstrate that its issues satisfy Supreme Court Rule 10, and the City opposes review of Furfaro's issues.

Regarding the warrant requirement, Furfaro has made no showing of any conflict with any decision from this Court. This Court has already refused to grant nude dancing automatic entitlement to the full First Amendment protections reserved for books and films. The court's decision below simply recognizes

this Court's reiterated distinction between nude dancing and pure expression. Furfaro cannot attain review on this issue.

Furfaro's second question presented is entirely new to the case. Furfaro's new contention was never assigned as error, briefed, or argued to the underlying courts during either the trial or Furfaro's appeal therefrom. Any alleged error in the probable cause instruction has not been preserved on appeal. The cross-petition should be denied.

A. The Washington Supreme Court's decision to reject Furfaro's warrant argument does not contradict prior decisions of this Court.

A petition for a writ of certiorari will be granted only for compelling reasons, as set forth in Supreme Court Rule 10. Furfaro fails to demonstrate that the Washington Supreme Court's decision reversing the warrant requirement satisfies the requirements of Rule 10, and the cross-petition should be denied.

1. No conflict under Rule 10(b).

Furfaro argues that "state and federal courts are divided regarding whether police officers must obtain warrants before arresting live entertainers or promoters for violations of an anti-obscenity ordinance." Cross-Pet. at 13. Furfaro's arrest cases involving *promoters* of obscene *materials* fail to establish grounds for this Court to accept review of the live entertainment arrest issues presented by Furfaro in this case, as explained more fully below. Seattle's adult entertainment ordinance

cannot fairly be characterized as merely an anti-obscenity ordinance, as it regulates conduct as well as obscene expression. Furfaro cannot obtain review by portraying the arrests in this case as arrests for promoting obscene materials.

Furfaro apparently seeks review under Rule 10(b), which requires that the underlying decision be in conflict with the decision of either another state court of last resort or of a United States court of appeals. Of the cases cited at pages 13 through 15 of the Cross-Petition, only two cases have the level of review specified under 10(b): *Penthouse Int'l, Ltd. V. McAuliffe*, 610 F.2d 1353 (5th Cir. 1980), and *State v. Furuyama*, 637 P.2d 1095 (Haw. 1981). However, as admitted by Furfaro, both of these cases involved an arrest for selling allegedly-obscene printed materials. Cross-Pet. at 14. There was no arrest in this case for selling or promoting any allegedly-obscene printed materials or films, and Furfaro fails to show a relevant conflict under Rule 10(b).

2. No conflict under Rule 10(c).

Furfaro argues that "This Court has held that live entertainment is entitled to the same level of First Amendment protection against prior restraints as are books and films." Cross-Pet. at 12. Of course, in this case, the arrests were indisputably made *after* the arresting officer observed the prohibited conduct. In reality, Furfaro seeks to have all arrests under Seattle's adult entertainment ordinance treated in exactly the same fashion as all seizures of allegedly-obscene printed materials or films: requiring a warrant issued in

advance by a magistrate. *Id.* However, Furfaro can identify no decision of this Court imposing such a requirement,[3] and review of this issue is not warranted under Rule 10(c).

The Washington Supreme Court correctly determined that nude dancers at arrest are not automatically entitled to the same constitutional protections afforded to allegedly-obscene printed materials or films. As set forth by this Court's opinion in *City of Erie v. Pap's A.M.*,[4] "so long as the regulation is unrelated to the suppression of expression, *'the government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word.'*" 120 S.Ct. at 1396 (2000) (emphasis supplied, additional citations omitted). This simple proposition is fatal to Furfaro's claimed entitlement to the protections of a warrant in this case.

The court below noted that *Pap's A.M.* considered nude dancing to fall "only within the outer ambit of the First Amendment's protection." Pet. App. at 8 (citing *Pap's A.M.*, 529 at 284). The court correctly rejected Furfaro's contention that *Roaden*,[5] *Doran*[6] and *Barnes*[7] would require a warrant for the arrests in this case. Pet. App. at 6-8 (144 Wn.2d at 369-371). In fact, the court emphasized *Doran's* comment that barroom nude dancing may involve "only the *barest minimum of*

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[3] Furfaro was similarly unable to make such a showing to the court below, which found that no federal or Washington court had imposed such a requirement. Pet. App. at 12.

[4] *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000).

[5] *Roaden v. Kentucky*, 413 U.S. 496 (1973).

[6] *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975).

[7] *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991).

protected expression." Pet. App. at 7 (*Id.* at 370). Furfaro can hardly contend that its requested warrant would afford it only minimum protection. *See,* Pet. App. at 7, fn. 2 (acknowledging that the barest forms of expression deserve the barest protections).

3. No conflict with *Southeastern Promotions*.

In reliance upon *Southeastern Promotions,*[8] Furfaro argued to the court below that because "live drama receives the same level of First Amendment protection as other forms of expression, live entertainers are entitled to be free from warrantless arrests." Pet. App. at 10 (144 Wn.2d at 373). The Washington Supreme Court declined to equate all of the nude dancing in this case with the theatrical performances at issue in *Southeastern Promotions,* instead finding it akin to the nude dancing *subset* of live entertainment discussed in *Schad.*[9] Pet. App. at 10-11 (*Id.* at 373-374).

Furfaro now contends that the court below erred in refusing to protect "live entertainment with exclusively nonverbal elements." Cross-Pet. at 16. In light of the *minimal* First Amendment protections reiterated by subsequent decisions of this Court, the Washington Supreme Court properly found no support in *Southeastern Promotions* for Furfaro's "claim that the First Amendment affords nude dancing the same level of protection given to books and film." Pet. App. at 11 (*Id.* at 374). The court's holding is not in conflict with this Court's earlier ruling that a theater's refusal to

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[8] *Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546 (1975).

[9] *Schad v. Borough of Mt. Ephraim,* 452 U.S. 61 (1981).

permit a scheduled performance of the musical "Hair" was a prior restraint.

4. No conflict with *Marcus*[10] and *Roaden*.

Furfaro argues that "there is nothing in this Court's *Marcus/Roaden* line of cases suggesting that the warrant requirement that applies to books and films should not apply to live performers and promoters." Cross-Pet. at 17. Of course, such a statement depends upon which cases are included in the "line." Other cases from this Court clearly differentiate the level of protections afforded to nude dancing, as opposed to books and films. For instance, as set forth above, *supra*, *Pap's A.M.* considered nude dancing to fall only within the "outer ambit" of the First Amendment, while *Doran* allowed that nude dancing may involve only the "barest minimum" of protected expression.

In *Marcus*, this Court addressed "whether the use by Missouri in this case of the search and seizure power to suppress *obscene publications* involved abuses inimical to protected expression." 367 U.S. at 729-730 (emphasis supplied). This Court noted as follows:

> "... The line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn. ... *The separation of legitimate from illegitimate speech* calls for ... sensitive tools ...." *Speiser v. Randall*, 357 U.S. 513, 525 n.24. It follows that, under the

[10] *Marcus v. Search Warrant*, 367 U.S. 717 (1961).

> Fourteenth Amendment, a State is not free to adopt whatever procedures it pleases for dealing with obscenity as here involved without regard to the possible consequences for constitutionally protected speech.

Id. at 731 (emphasis supplied). Thus, *Marcus* dealt with the distinction between legitimate versus illegitimate speech, rather than the distinction between conduct and expression. *Marcus* did not extend presumptive First Amendment protections to all conduct that occurs on stage, nor is it in conflict with the Washington Supreme Court's decision to reverse the warrant requirement.

This Court in *Doran* analyzed a preliminary injunction that prohibited enforcement of a local ordinance. The ordinance made it unlawful "to permit waitresses, barmaids, and entertainers to appear in their establishments with breasts uncovered or so-thinly-draped as to appear uncovered." 422 U.S. at 924. In assessing the likelihood of success on the merits, this Court held:

> Although the customary "barroom" type of nude dancing may involve only the *barest minimum* of protected expression, we recognized in *California v. LaRue*, 409 U.S. 109, 118 (1972), that this form of entertainment might be entitled to First and Fourteenth Amendment protection under *some circumstances*. In *LaRue*, however, we concluded that the broad powers of the

States to regulate the sale of liquor, conferred by the Twenty-first Amendment, outweighed any First Amendment interest in nude dancing and that a State could therefore ban such dancing as a part of its liquor license program. In the present case, the challenged ordinance applies not merely to places which serve liquor, but to many other establishments as well. The District Court observed, we believe correctly:

> The local ordinance here attacked not only prohibits topless dancing in bars but also prohibits any female from appearing in "any public place" with uncovered breasts. There is no limit to the interpretation of the term "any public place." It could include the theater, town hall, opera house, as well as a public market place, street or any place of assembly, indoors or outdoors. Thus, this ordinance would prohibit the performance of the "Ballet Africains" and a number of other works of unquestionable artistic and socially redeeming significance. 364 F. Supp., at 483.
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> * * *

Even if we may assume that the State of New York has delegated its authority under the Twenty-first Amendment to towns such as North Hempstead, and that the ordinance would therefore be constitutionally valid under *LaRue, supra,* if

> limited to places dispensing alcoholic beverages, the ordinance in this case is not so limited. Nor does petitioner raise any other legitimate state interest that would counterbalance the constitutional protection presumptively afforded to activities which are plainly within the reach of Local Law 1-1973. *See United States v. O'Brien,* 391 U.S. 367, 377 (1968). In these circumstances, and in the light of existing case law, we cannot conclude that the District Court abused its discretion by granting preliminary injunctive relief.

Id. at 932-934 (emphasis supplied).

The works afforded presumptive constitutional protection under *Doran's* analysis are the "works of unquestionable artistic and socially redeeming significance," such as the Ballet Africains. *Doran's* overbreadth analysis does not render all live acts to be expression, nor does it extend presumptive protection to any and all displays of the uncovered female breast, let alone the acts of the plaintiffs reported by the arresting officers in this case.

The *Doran* opinion cites to *O'Brien,* where this Court rejected presumed protections for conduct:

> O'Brien first argues that the 1965 Amendment is unconstitutional as applied to him because his act of burning his registration certificate was protected "symbolic speech" within the First Amendment. His argu-

> ment is that the freedom of expression which the First Amendment guarantees includes all modes of "communication of ideas by conduct," and that his conduct is within this definition because he did it in "demonstration against the war and against the draft." We cannot accept the view that an apparently limitless variety of conduct can be labeled "speech" whenever the person engaging in the conduct intends thereby to express an idea. *However, even on the assumption that the alleged communicative element in O'Brien's conduct is sufficient to bring into play the First Amendment, it does not necessarily follow that the destruction of a registration certificate is constitutionally protected activity.*

United States v. O'Brien, 391 U.S. 367 (1968) (emphasis supplied).

Thus, the *O'Brien* opinion refused to presume that all communicative conduct is entitled to constitutional protection. Instead, *O'Brien* maintained the distinction between conduct and speech, as well as the distinction in constitutional protections that are presumptively afforded to each. Under *O'Brien*, this Court would not require a warrant prior to arresting a protester for destroying his registration certificate. Neither *O'Brien* nor *Doran* conflicts with the Washington Supreme Court's decision to reverse the warrant requirement in this case.

This Court in *Roaden* discussed the scope of presumptive protection afforded to expression:

> ... prior restraint of the right of expression, whether by *books or films*, calls for a higher hurdle in the evaluation of reasonableness. The *setting of the bookstore or the commercial theater*, each presumptively under the protection of the First Amendment, invokes such Fourth Amendment warrant requirements because we examine what is "unreasonable" in the light of the values of freedom of expression.

Roaden, 413 U.S. at 504 (footnote omitted; emphasis supplied). Thus, this Court in *Roaden* did not extend presumptive protections beyond books and films. In conjunction with *Doran*, *Roaden* would support extending protections to printed materials, films, and performances of the Ballet Africains and other works of "*unquestionable* artistic and socially redeeming significance." Given this Court's subsequent comments, all nude dancing is not presumed to have unquestionable artistic and socially redeeming significance. Neither *Roaden* nor *Doran* extends presumptive protections or a pre-arrest requirement of a warrant to the conduct reported by the arresting officers in this case.

In sum, the Washington Supreme Court gave full effect to prior statements of this Court that nude dancing is on the "fringe" of First Amendment expression, allowing states to regulate such activity more freely than expression in books or films.

Furfaro's argument in support of a warrant would ignore this Court's distinction between nude dancing and pure expression. The Washington Supreme Court is not in conflict with this Court in refusing to require a warrant for the arrests in this case.

B. Furfaro cannot raise a new argument regarding pre-arrest subjective determinations of obscenity by an arresting officer.

Under the Washington law governing Furfaro's appeal from the trial court's disposition of this case, issues that are not argued on appeal are considered abandoned. *State v. Williams*, 96 Wn.2d 215, 226, 634 P.2d 868 (1981). Without cogent argument and briefing, the court should not consider an issue on appeal. *Schmidt v. Cornerstone Investments*, 115 Wn.2d 148, 160, 795 P.2d 1143 (1990).

Furfaro never assigned any error to the trial court's instructions on probable cause. Furfaro has never argued to any Washington appellate court that an officer should be required to subjectively assess obscenity prior to making a lawful arrest in this case. Furfaro cannot raise these new issues on appeal. *See, Law Offices of Stein v. Cadle Co.*, 250 F.3d 716, 718 n. 3 (9th Cir.), *cert. denied*, __ U.S. __, 122 S.Ct. 215 (2001) ("we decline to allow [the government] to raise the issue for the first time on appeal."); *Crawford v. Lungren*, 96 F.3d 380, 389 n.6 (9th Cir. 1996) ("The district court is not merely a way station through which parties pass by arguing one issue while holding back a host of others for appeal.").

CONCLUSION

For the reasons set forth above, the City opposes the conditional cross-petition by Furfaro in this matter. The City respectfully requests that the cross-petition be denied in its entirety.

Respectfully submitted.

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